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IN THE

**Supreme Court of the United States**

OCTOBER TERM 1945.

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No. 954  
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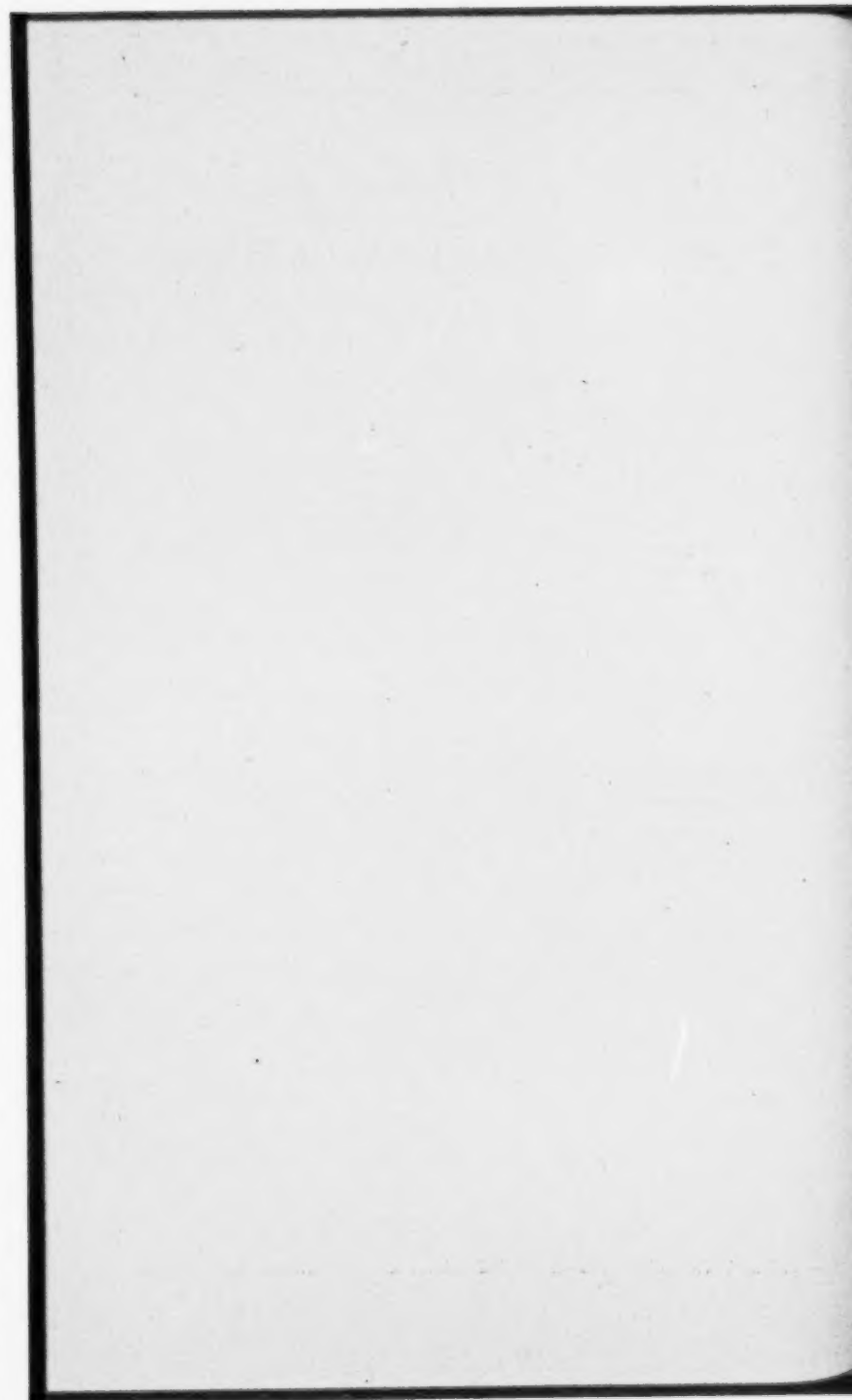
JOSEPH MERANDO, trading as Merando Company, *Petitioner*,

v.

JOSEPH MATHY and JOHN MATHY, Co-partners, trading as  
the Mathy Company, *Respondents*.

—  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA AND BRIEF IN SUP-  
PORT THEREOF.**  
—

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA.**

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*To the Honorable, the Chief Justice of the United States,  
and the Associate Justices of the Supreme Court of the  
United States:*

The petition of Joseph Merando, trading as Merando  
Company respectfully shows to this Honorable Court:

**A.**

**OPINIONS BELOW.**

The opinion of the United States Court of Appeals for  
the District of Columbia is found in the record at p. 362  
and is also reported in 152 Fed. (2nd) 21; 74 Washington  
Law Reporter 74.

**B.****JURISDICTION.**

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. at L. 936; 28 U. S. C. Section 347.

2. The date of judgment to be reviewed, namely, the judgment of the United States Court of Appeals for the District of Columbia, is December 10th, 1945 (Rec. 365). Petition for rehearing was denied January 4th, 1946 (Rec. 366).

**C.****SUMMARY STATEMENT OF THE MATTERS INVOLVED.**

Respondents, sub-contractors, (plaintiffs-appellees below), brought suit August 31, 1943 in the District Court of the United States for the District of Columbia, to recover damages for alleged breach of contract by the petitioner, a general government contractor (defendant-appellant below). On February 12, 1944, after the petitioner had completed the respondents' sub-contract he filed a counterclaim to recover his increased costs to complete. Trial was had without a jury and judgment was entered in respondents favor for the sum of \$5,144.79 (Rec. 28).

The petitioner and respondents entered into a sub-contract (Rec. 315) under which respondents were to perform plumbing and sheet-metal work incident to replacing downspouts in the old Post Office and Court House in Pittsburgh, Pennsylvania. The petitioner was to "do cutting and patching in connection with brickwork, concrete, plaster, woodwork, marble, also furnish scaffold for the sheet metal work in tower" (Rec. 316). This work was to be done by the maintenance men in the Post Office, which was known by the respondents before they entered into the sub-contract (Rec. 45).

The respondents charged that they were compelled on August 12, 1943 to notify the petitioner that unless certain cutting work "was promptly done, *or* the plaintiffs authorized to do same at defendant's expense, they would have to discontinue their work" (Italics supplied) (Rec. 2) and that petitioner did not do the cutting *and* refused to permit the respondents to do the same at his expense. They further alleged that on August 16, 1943 their work had reached a stage where they could proceed no further until the cutting was done and so advised petitioner, who instead of carrying out his obligation to do the cutting, notified them on August 17, 1943, their contract was terminated (Rec. 2 and 3).

The sub-contract between the parties was dated June 7, 1943, (Rec. 315) and on June 16, 1943 the respondents were notified to proceed with their work (Rec. 318), but were unable to do so at that time because they were having trouble getting their foreman who was being held up in Boston (Rec. 225-226) and they did not proceed until July 5, 1943 (Rec. 36).

On July 27-28, 1943 the government inspector reported the job only 25 per cent completed, whereas 50 per cent would have been normal, and that the running of the downspouts was going slow because of lack of plumbers (Rec. 319).

On July 30, 1943 petitioner wrote respondents requesting that more plumbers be put to work (Rec. 322) and on August 5, 1943 wired respondents concerning progress of the work (Rec. 325).

On August 10, 1943, without any notice to the petitioner, respondents' foreman stopped petitioner's men from working (Rec. 130) and then two days later, on August 12, 1943, respondents wrote petitioner complaining about the progress of the cutting work and concluded by saying "For your information it is in the bylaws of the Pittsburgh Plumbers' Union that they do all cutting in connection with their work. You will please forward at once to our superintendent, Mr. William J. Curton, Room 1211, Hotel Keystone, Boule-

ward of the Allies and Wood Street, Pittsburgh, Pa., a written order, properly signed, authorizing *us* to do this cutting for you. Only under these conditions can we continue our work on the job." (*Italics supplied*) (Rec. 330).

The following day, August 13, 1943, respondents' foreman laid off his men and shut down the job (Rec. 77).

The petitioner's manager arrived in Pittsburgh on August 14, 1943 and found the job entirely shut down. Thereafter in accordance with the terms of the sub-contract he notified the respondents their sub-contract had been terminated (Rec. 336).

Thereafter petitioner, after contacting several plumbing contractors made arrangements for completion of the work covered by the sub-contract (Rec. 238, 283 and 336), which resulted in an increased cost to petitioner of approximately \$9,000.00 (Rec. 342-354).

#### D.

#### QUESTIONS PRESENTED.

1. Whether the court had the right to hold the petitioner was liable in damages for breach of contract (failure to perform his part of the sub-contract), when it had found as matter of fact that respondents had stopped his men from working.

2. Whether a party can assign one reason for refusing to perform his contract and then after litigation has begun change his ground and put his conduct upon another and different consideration.

3. Whether under the terms of the sub-contract the petitioner had the right to terminate the same, in the event it was not being performed to his satisfaction.

4. Whether the court had the right to include in the judgment in favor of the respondents, anticipated profits based on information furnished by respondents' counsel to the trial justice, after the trial was over and which was not offered in evidence.



**E.****REASONS RELIED ON FOR THE ALLOWANCE OF  
THE WRIT.**

1. The opinion of the United States Court of Appeals for the District of Columbia is based upon an apparent misunderstanding of the facts proven and found by the trial court. The undisputed facts proven and as found by the trial court were that the respondents stopped the petitioner's men from working on August 10, 1943, notwithstanding which, the appellate court in its opinion stated in part as follows: "The defendant offered no proof at the trial which would permit a finding that plaintiffs' man, either by word or deed, set up any real bar against the defendant in proceeding with the cutting work".

2. The United States Court of Appeals for the District of Columbia totally ignored the fact that the respondents stated in writing *before* they stopped work that the *only condition* upon which they could continue their work, was to receive from the petitioner an order in writing for *them* to do the cutting with plumbers, and then after suit was filed, they attempted to brush aside that condition and base their refusal to continue working upon the alleged claim that because of the failure of the petitioner to do the cutting there was no work for them to perform.

3. The United States Court of Appeals for the District of Columbia in holding that under the terms of the subcontract the petitioner did not have the right to terminate the contract in the event it was not being performed to his satisfaction has misinterpreted the decisions of this Court.

4. The United States Court of Appeals for the District of Columbia, in affirming the judgment of the lower court erroneously included in the judgment in favor of the respondents anticipated profits based upon information furnished by respondents' counsel to the trial justice after the trial was over and which had not been offered in evidence.

## F.

**PRAYER FOR WRIT.**

Wherefore, The Premises Considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8930, January Term 1945, *Joseph Merando, Trading as Merando Company, Appellant v. Joseph Mathy and John Mathy, Co-partners, Trading as The Mathy Company, Appellees*, and that said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

WILLIAM F. KELLY,  
P. J. J. NICOLAIDES,  
*Attorneys for Petitioner.*

